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June 29, 2005

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: Petition of Verizon New England Inc. for Arbitration; D.T.E. 04-33

Dear Secretary Cottrell:

By letter dated June 23, 2005, Conversent Communications submitted in this proceeding a Hearing Examiner's report issued in a case pending in Maine, claiming that the report supports Conversent's positions on three issues in particular in this arbitration. Conversent is mistaken. The Maine report offers no support for Conversent's claims.

As the Maine report clearly states on its very first page, it is merely "the recommendation of the Hearing Examiner. ... [I]t does not constitute Commission action." Parties have a right to file comments on the report before the Commission determines whether to adopt it, in whole or part, as its order in the case. In addition, the report relies heavily on a prior decision of the Maine Commission dating from September of 2004 which also asserts state authority to enforce Section 271 obligations. That order, however, is on appeal to the Federal District Court and conflicts with previous orders of the Department.

Conversent cites the Maine Hearing Examiner's "understanding" that the FCC's rules regarding FTTP apply to mass-market loops only, not to loops serving businesses. The Examiner's understanding, however, was based on the demonstrably false proposition that, "The FCC was clear to limit the application of the new rules to mass market customers, i.e. residential customers." Report, at 21, *citing TRO* ¶ 197, n. 624 and ¶ 200. As Verizon MA pointed out in its Initial Brief in this proceeding, at 55, while the FTTP rule promulgated by the *TRO* did indeed speak in terms of fiber loops that are deployed to "a residential unit," the FCC subsequently issued an Errata to the *TRO* in which it replaced "residential unit" with the customer-neutral term

"end user customer premises," thereby effectuating its intent to exclude FTTP loops serving businesses from any unbundling requirement. The Maine report fails to address or even acknowledge the existence of the Errata.

Second, Conversent points out that the Hearing Examiner recommended that Verizon should identify in its tariff those wire centers that satisfy the FCC's non-impairment criteria for high capacity loops and transport. Of course, this arbitration is not a tariff proceeding, and the recommendation to *tariff* the list of qualified wire centers does not support (and in fact would make unnecessary) Conversent's efforts here to write such a list into Verizon MA's *interconnection agreements* and preclude Verizon MA from amending the list as appropriate. Further, neither Conversent nor the Maine hearing examiner explain how a state commission can overrule the FCC's directive in ¶ 234 of the TRRO that disputes as to the availability of high capacity loops and transport are to be decided on a case by case basis, pursuant to the dispute resolution terms of the parties' interconnection agreements.

Third, Conversent cites to the Maine Hearing Examiner's decision to limit the application of the FCC's cap on DS1 dedicated transport solely to routes where DS3 transport need no longer be unbundled. But the FCC's applicable rule contains no such limitation. It states, in its entirety, as follows:

> Cap on unbundled DS1 Transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

47 C.F.R. §51.319(e)(2)(ii)(B). The Examiner's ruling rests solely on a similar decision of the New York PSC. That decision rests, in turn, on language in ¶ 128 of the *TRRO* itself which implies that the FCC's cap on DS1s might be limited in scope. To that extent, ¶ 128 is inconsistent with the rule itself. The NY PSC stated that, "We read the TRRO as a whole as intending to apply the 10-loop cap only where the FCC found non-impairment for DS3 transport." (*See* Maine Report, at 45, quoting the NY PSC's decision.) Neither the PSC nor the Maine Hearing Examiner, however, explains the basis for appealing to the text of the *TRRO* to interpret a perfectly unambiguous rule, thereby reading into the rule a new term that simply isn't there. Neither the NY PSC nor the Department may re-write the FCC's rule based upon speculation as to what the FCC intended. Until and unless the FCC itself revises the rule, it must be applied as written.

The Maine Hearing Examiner purports to make determinations regarding the scope of Verizon's obligations under Section 271 of the Telecommunications Act of 1996. The examiner's position is contrary to prior orders of the Department. In its *Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17*, entered in D.T.E. Nos. 03-60 and 04-73 on December 15, 2004, at 55-56, the Department stated that:

> As we noted in D.T.E. 03-59, the FCC has the authority to determine what constitutes a "just and reasonable" rate under Section 271, and the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations. D.T.E. 03-59, at 19, *citing* 47 U.S.C. §271(d)(6); *see also* D.T.E. 98-57 Phase III-D, at 16.... We do not have authority to determine whether Verizon is complying with its obligations under Section 271.

For these reasons, the Maine report provides no support for Conversent's position in this proceeding, and the Department should give it no weight.

Sincerely,

Alexander W. Moore

cc: Service List